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January 4, 2002

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, DC 20554

Re: CS Docket No. 98-82 et al.
Further Notice of Proposed Rulemaking (FCC 01-263)

Dear Ms. Salas:

On behalf of Altrio Communications, Inc.; BellSouth Entertainment, LLC; the Independent Multi-Family Communications Council; Qwest Broadband Services, Inc.; and The Wireless Communications Association International, Inc. (the "Joint Parties"), we hereby submit for inclusion in the record for the above-captioned proceeding the attached Joint Comments filed in response to the pending *Notice of Proposed Rulemaking* in CS Docket No. 01-290, in which the Commission is considering whether to permit the statutory ban on exclusive contracts for vertically integrated cable programming to sunset as of October 5, 2002. In particular, we draw the Commission's attention to pages 5-11 of the Joint Comments, in which the Joint Parties discuss how increased consolidation of the largest cable multiple system operators affects the Joint Parties' ability to obtain programming on nondiscriminatory terms and conditions. Also, we ask the Commission to note pages 13-14, in which the Joint Parties discuss the marketplace behavior of Comcast Corporation, who perhaps would be the greatest beneficiary of any relaxation of the Commission's cable horizontal ownership cap.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,

/s/

Robert D. Primosch

Counsel for The Joint Parties

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	CS Docket No. 01-290
Act of 1992	)	
	)	
Development of Competition and Diversity	)	
In Video Programming Distribution:	)	
Section 628(c) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

JOINT COMMENTS

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December 3, 2001

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EXECUTIVE SUMMARY

The parties to these Joint Comments (the "Joint Parties") are wireline broadband, wireless cable and private cable operators ("terrestrial competitors") who compete for subscribers against the largest cable multiple system operators ("MSOs") in an increasingly challenging economic environment. Recognizing that terrestrial competitors cannot survive without full and fair access to popular cable programming, Congress adopted Section 628 of the Cable Competition and Consumer Protection Act of 1992 (the "1992 Act"), which generally requires that programming owned or controlled by incumbent cable operators (*i.e.*, "vertically integrated" programming) be made available to competitors on fair and nondiscriminatory terms. Section 628 is anchored by Section 628(c)(2)(D), which generally bans exclusive contracts between vertically integrated cable networks and incumbent cable operators. The possibility that the Commission might permit Section 628(c)(2)(D) to sunset as of October 5, 2002 is a matter of vital importance to the Joint Parties – without access to the programming covered by Section 628(c)(2)(D), the Joint Parties will not have a viable multichannel video programming service to sell to subscribers.

At the outset, it must be emphasized that *there is no statutory impediment to continued enforcement of Section 628(c)(2)(D)*, and that the Commission therefore need not be concerned about whether it has the authority to stop the scheduled sunset of the statute. In Section 628(c)(5), Congress specifically gave the Commission the authority to permit Section 628(c)(2)(D) to remain in force if it determines that the statute's ban on exclusivity "continues to be necessary to preserve competition and diversity in the distribution of video programming." That condition is satisfied here.

First, Section 628(c)(2)(D)'s ban on exclusivity is the cornerstone of the entire federal program access law. This is because Section 628's remaining provisions regarding unfair practices, undue influence and price discrimination have little practical significance if programmers are afforded an unlimited right to withhold their programming by entering into exclusive contracts with the largest cable MSOs. A sunset of Section 628(c)(2)(D) would be tantamount to a sunset of *all* of Section 628 for terrestrial competitors who do not have sufficient bargaining leverage to acquire programming on nondiscriminatory terms and conditions.

Second, continued enforcement of Section 628(c)(2)(D) is especially critical now that national and local concentration of the largest cable MSOs has reached extraordinary levels and may increase even further if the Commission raises its cable horizontal ownership cap pursuant to its pending *Further Notice of Proposed Rulemaking* in CS Docket No. 98-82 *et al.* Consolidation lies at the heart of the program access problem: whereas cable programmers once had opportunities to sell their programming to multiple cable operators in a local market, in many cases they are now and will continue to be forced to deal with a single cable operator who has consolidated previously independent systems into a cluster and thus controls the lion's share of the market's subscribers. This exposes terrestrial competitors to an incalculable risk that programmers will accede to cable's dominance over distribution and refuse to sell their programming to terrestrial competitors that do not yet serve a comparable "critical mass" of subscribers. This scenario demands retention, not a sunset, of the ban on exclusivity in Section 628(c)(2)(D).

Third, the programming covered by Section 628(c)(2)(D) is significant – it includes national/regional sports programming and "brand name" news and entertainment networks that drive subscribership and advertising revenue for cable's competitors. Simply put, it is very hard to envision a terrestrial provider competing effectively with the largest cable MSOs without access to games played by local professional sports teams or services such as CNN or HBO. The MSOs are well aware of this - indeed, it is no coincidence that some MSOs have already withheld regional sports programming from their competitors, who in turn have suffered material losses in subscribership as a result. The Commission will invite this predicament on a national scale should it permit Section 628(c)(2)(D) to sunset next year.

Fourth, other marketplace evidence confirms that Section 628(c)(2)(D)'s ban on exclusivity should be retained. The Commission has long recognized that competition ultimately is the most effective safeguard against anti-consumer behavior by the largest cable MSOs, and this is particularly true in markets where terrestrial competition has established a foothold. Indeed, terrestrial competitors are the *only* true substitute for incumbent cable service in the large number of markets where Direct Broadcast Satellite ("DBS") operators are unable to offer local television broadcast signals (*i.e.*, "local into local" service). Moreover, contrary to what the cable MSOs will likely argue in this proceeding, the fact that the multichannel video marketplace has "evolved" from a cable monopoly to a market dominated by cable and DBS is hardly compelling evidence that the market is fully competitive, especially now that the two primary DBS providers, DirecTV and EchoStar, have proposed to merge their operations. Equally important, the notion that the Commission's inquiry should begin and end with the competitive position of DBS is flatly contradicted by the legislative history of Section 628 (in which Congress explicitly rejected an alternative to Section 628 that would have given full protection to the satellite industry only) and by Commission precedent holding that the effects of exclusivity on *all* competitors must be fully considered when evaluating the harm exclusive cable programming contracts may cause to the public interest.

Finally, all available evidence indicates that enforcement of Section 628(c)(2)(D) has *not* restrained programming diversity or otherwise caused any cognizable economic harm to the largest cable MSOs or the programming services they own. By any relevant measure, programming diversity has increased dramatically in the nine years since Section 628(c)(2)(D) became law, and there is no evidence which suggests that the statute's ban on exclusivity has had any material effect on the willingness of incumbent cable operators to invest in programming. Nor is there any evidence that the inability to offer exclusive contracts has had any meaningful impact on whether vertically integrated cable networks achieve wide distribution. The MSOs' own previous filings with the Commission admit as much, and the recent success of a number of start-up cable networks that either cannot or do not offer exclusivity (*e.g.*, The History Channel, Cartoon Network, Home & Garden Network, Animal Planet, The Golf Channel) reaffirms the point.

In sum, this proceeding presents the Commission with a choice: it can take comfort in the gains achieved by DBS and declare the battle for a competitive multichannel video marketplace over (cable's 80% market share and the absence of local-into-local service in the majority of the country notwithstanding), or it can give full effect to Congressional intent by continuing to foster the development of *all* forms of competition to cable. Should the Commission choose the latter (and every relevant legal, economic and public policy consideration suggests that it must), then the process should begin with a clear and unequivocal

Commission declaration that enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve competition and diversity in the distribution of video programming," and that the Commission will therefore continue to enforce the statute. Consumers, in the end, will be the beneficiaries of that decision.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	CS Docket No. 01-290
Act of 1992	)	
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In Video Programming Distribution:	)	
Section 628(c) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

JOINT COMMENTS

The parties listed in Exhibit A hereto (the "Joint Parties"), representing wireline broadband, wireless cable and private cable operators who provide competitive multichannel video programming service to consumers in local markets throughout the United States, hereby submit these joint comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1]

I. INTRODUCTION.

As recognized by the Commission, Congress has determined that "access to programming is an essential prerequisite to the ability to compete against incumbent cable

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[1] FCC 01-307 (rel. Oct. 18, 2001). The Joint Parties are Altrio Communications, Inc.; BellSouth Entertainment, LLC; the Independent Multi-Family Communications Council ("IMCC"); Qwest Broadband Services, Inc. ("Qwest"); and The Wireless Communications Association International, Inc. ("WCA"). A description of each Joint Party is provided at Exhibit A.

operators."[2] Congress thus adopted Section 628 of the Cable Competition and Consumer Protection Act of 1992 (the "1992 Act"), which generally requires that programming owned or controlled by incumbent cable operators ("vertically integrated" programming) be made available to cable's competitors on nondiscriminatory terms and conditions.[3] The touchstone of Section 628 is Section 628(c)(2)(D), which generally prohibits exclusive contracts between vertically integrated cable networks and incumbent cable operators.[4] Section 628(c)(2)(D)'s ban on exclusivity is scheduled to sunset on October 5, 2002 "unless the Commission finds, . . ., that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[5] The Commission thus has issued the *NPRM* to determine whether marketplace conditions require continued enforcement of the statute.

The Commission can and should continue to enforce Section 628(c)(2)(D) – without it, Section 628's remaining provisions that prohibit unfair practices, undue influence and price discrimination effectively become meaningless. For terrestrial competitors, a sunset of Section 628(c)(2)(D) would be tantamount to a sunset of *all* of Section 628. Furthermore, the root cause of the program access problem, *i.e.*, the consolidation of the largest cable multiple system operators ("MSOs") in national and local markets, has become materially worse in the nine years since Congress passed Section 628(c)(2)(D), and stands to reach unprecedented levels in the future if the Commission raises its cable horizontal ownership cap pursuant to its pending *Further Notice of Proposed Rulemaking* in CS Docket No. 98-82 *et al.* Also, the programming

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[2] *Outdoor Life Network and Speedvision Network,* 13 FCC Rcd 12226, 12235 (CSB, 1998) ("*Outdoor Life*").

[3] 47 U.S.C. § 548.

[4] *Id*. § 548(c)(2)(D); *see also* 47 C.F.R. § 76.1002(c)(2) (implementing Section 628(c)(2)(D)).

[5] 47 U.S.C. § 548(c)(5).

covered by Section 628(c)(2)(D) includes crucial national/regional sports programming and "brand name" news and entertainment networks, and the cable MSOs have repeatedly demonstrated that they will deny competitors access to such programming where the program access law permits them to do so. Finally, all available evidence indicates that Section 628(c)(2)(D)'s ban on exclusivity has benefited consumers substantially by facilitating a more competitive market for multichannel video programming service, without reducing programming diversity or deterring the cable MSOs from investing in programming.

II. DISCUSSION.

A. *Section 628(c)(2)(D) Is A Critical Component of The Federal Program Access Law and Congress's Broader Statutory Framework For Promoting Competition in the Market for Multichannel Video Programming Service.*

The importance of Section 628(c)(2)(D) to the integrity of the federal program access law cannot be overstated. Section 628(c)(2)(D) is not merely one of several co-equal provisions of Section 628 – it is the core provision which animates the entire statute. While it is true that Section 628 also bans unfair practices, undue influence and in some cases price discrimination,[6] those provisions of the statute have little practical significance if vertically integrated programmers are given an unlimited right to enter into exclusive contracts. In that scenario, a competitor that has been victimized by unfair practices, undue influence or price discrimination might at best obtain monetary damages through the Commission's program access complaint process.[7] It would not, however, be guaranteed any access to the defendant's programming, since

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[6] *Id*. § 548(b) and (c)(2)(A)-(B).

[7] *See* 47 C.F.R. § 76.1003(h). However, unfair practices/undue influence cases are rare (largely due to the vagueness of the legal standards applicable to each) and Section 628's price discrimination criteria have proven to be difficult to apply in case-by-case adjudications of price discrimination complaints. *See, e.g.*, *Turner Vision, Inc. et al. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, 12611-12 (CSB, 1998).

the defendant would retain the option of entering into exclusive contracts with the largest cable MSOs, with no threat of sanction by the Commission. Because access to the defendant's programming is what the competitor really wants (since without it the competitor cannot compete effectively for subscribers), stripping Section 628(c)(2)(D) out of Section 628 would leave the competitor with the Hobson's choice of (1) capitulating to any and all unreasonable terms and conditions demanded by vertically integrated cable networks as a *quid pro quo* for immediate access to their programming, or (2) pursuing relief through the Commission's program access complaint process, with no access to the underlying programming in the interim or any assurance that the programming will be made available to it even if its complaint is successful. For terrestrial competitors who can ill afford to suffer the subscriber losses caused by option (2), this "choice" would be tantamount to a sunset of *all* of Section 628, something Congress has given the Commission no authority to do.

In addition, a sunset of Section 628(c)(2)(D) would have implications well beyond the enforceability of Section 628 as a whole – it would threaten the integrity of the 1992 Act's broader framework for protecting consumers from potential abuses of cable's market power. Congress did not intend to achieve the pro-competitive objectives of the 1992 Act through Section 628 alone – rather, Section 628 is one of several complementary statutory provisions that address different manifestations of cable's market power but operate collectively to serve the overriding pro-competitive objectives of the Act.[8] Thus, for example, the Commission's program access rules are designed to prevent certain types of anti-competitive conduct not

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[8] *See, e.g., Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19098, 19105 (1999) ("Since Congress was aware of the interplay between the horizontal rule and the other rules addressing programming, it is clear that Congress intended for all the rules to work together in a complementary fashion.") (the "*Horizontal Ownership Third Report and Order*").

addressed by the Commission's cable horizontal ownership rules, and vice-versa.[9] Were the Commission to permit a sunset of Section 628(c)(2)(D) and thus cripple Section 628 in its entirety, cable's competitors would have no meaningful recourse under the Act's horizontal ownership provisions (or, for that matter, any other provision of the Act) if they are denied full and fair access to vertically integrated programming. As discussed in greater detail below, this is an especially compelling rationale for continued enforcement of Section 628(c)(2)(D) now that the Commission is seriously contemplating a dramatic relaxation of its cable horizontal ownership cap that would further strengthen cable's control over distribution of programming in national and local markets.

B. *The Marketplace Conditions That Have Given Risen To The Program Access Problem Have Become Materially Worse Since Congress Passed Section 628.*

As the Commission observed during its review of AT&T's acquisition of MediaOne, "[c]oncentrated markets are more prone to collusive outcomes than are competitive markets."[10] Concentration of ownership among cable operators bears directly on the program access problem because it increases the buying power of the cable MSOs and facilitates their ability to coordinate their conduct.[11] Thus, insofar as the debate over Section 628(c)(2)(D) is concerned, it

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[9] *Id*. at 19105-6 ("The [horizontal ownership] limit is a structural complement to the other access provisions. Thus, for example, . . . the horizontal ownership rules limit the potential for anticompetitive abuses of purchasing power in areas outside of the core areas covered by the program access rules . . . ."); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9845 (2000) ("[T]he Applicants argue that other Commission rules, such as program access, program carriage, must carry, leased access, and the channel occupancy rules foreclose their ability to exert excessive programming market power. While those rules are important, they are complements rather than substitutes to the horizontal ownership rules.") ("*AT&T/MediaOne*").

[10] *Id*. at 9843-4.

[11] *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996). *See also AT&T-MediaOne,* 15 FCC Rcd at 9843 ("Because cable operators generally do not compete against each other in their respective franchise areas, they may incur no loss

is highly significant that national and local concentration of ownership in the cable industry has reached extraordinary levels. For example, in its most recent annual *Video Competition Report* to Congress, the Commission found that incumbent cable operators serve over 80% of all multichannel video subscribers,[12] that the top ten cable MSOs serve nearly 90% of all cable subscribers,[13] and that approximately two-thirds of those subscribers are served by cable system "clusters" in local markets.[14]

The implications of this for terrestrial competitors are serious. Whereas cable programmers once had significant opportunities to sell their programming to multiple cable operators in a local market, in many cases they are now forced to deal with a single cable operator who has consolidated previously independent systems into a cluster and thus controls the lion's share of the market's subscribers.[15] In turn, this exposes terrestrial competitors to an incalculable risk that programmers will accede to cable's dominance over distribution and refuse to sell their programming to alternative multichannel video providers that do not yet serve a comparable "critical mass" of subscribers. As noted by the Commission, this is not idle speculation:

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from carrying the same programming networks and have little economic disincentive for coordinated action.").

[12] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, at Table C-1 (rel. Jan. 8, 2001) ("*Seventh Annual Report*").

[13] *Id.* at ¶ 15.

[14] *Id.* at ¶ 158 and at Table C-2. In the largest cluster size category (over 500,000) subscribers, the number of clusters increased by 33.3% between 1998 and 1999, and the number of subscribers served by those clusters increased by 21.4%. *Id.* at ¶ 158.

[15] *See, e.g.*, "Turner Pleases Crowd with Remarks," *Multichannel News* (Nov. 28, 2001), *at* http://www.multichannel.com ("Turner predicted that consolidation would leave the industry with only two supersized MSOs and four or five programming entities. . . AT&T Corp. will be gone within two or three years, Turner predicted. If AOL Time Warner is successful in buying AT&T Broadband, Cox Communications Inc. and Comcast Corp. will be forced to merge, he added.").

> The decreasing marginal value of additional channels, the more limited exposure these channels receive by virtue of their placement on digital or other channels, the more limited exposure these channels receive by virtue of their placement on digital or other tiers to which subscribership is restricted, and the associated difficulties of attracting an audience base to support advertising sales all tend to suggest that [channel] capacity increases have not had the consequence suggested [by incumbent cable operators] and that channel expansion has not negated the Congressional concerns. *Cable operators still have the power to decide which cable networks will "make it" even as channel capacity grows.*[16]

The marketplace has proven the Commission correct – it is apparent that cable's control over distribution is sufficient to drive even the most powerful programmers to distraction. It is well known, for example, that News Corp. abandoned its 1997 joint venture with DBS operator EchoStar Communications Corporation ("EchoStar") after incumbent cable operators responded to the transaction by refusing to discuss carriage of Fox cable programming.[17] Unwilling to put the financial viability of Fox's programming at risk, News Corp. took the path of least resistance,

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[16] *Horizontal Ownership Third Report and Order*, 14 FCC Rcd at 19105 (emphasis added). *See also AT&T/MediaOne*, 15 FCC Rcd at 9841 ("Start-up video programmers need to reach a critical level of subscribership quickly in order to achieve long-term financial viability. Video programmers' need for a large number of subscribers confers on AT&T, MediaOne and [Time Warner], which have access to a large number of subscribers, significant bargaining power."); "Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996) ("Operators warn that if existing programmers don't play ball on exclusivity, a new and similar network probably will. 'There's more than one news service and more than one sports service now and more competition is inevitable,' says an executive at one of the U.S.'s five largest MSOs, 'We have choices and if one service doesn't want to work with us, we have other places we can go.'"). It must also be remembered that the influence of the largest cable MSOs over vertically integrated programmers may be pervasive even where they do not hold controlling or even voting interests in those services. *See, e.g., Implementation of the Cable Television Consumer Protection Act of 1992, et al.*, 14 FCC Rcd 19014, 19054-5 (1999) ("It is appropriate to attribute nonvoting equity and to not allow the insulated limited partnership and single majority shareholder exceptions to the 'program access' type rules. By virtue of a significant nonvoting equity interest, one party has the incentive to influence or favor the other party, and all of the 'program access' type rules are designed to prevent the harm caused by this type of influence or favoritism.") ("*Cable Ownership Attribution Order*").

[17] *See, e.g.*, Colman, "Murdoch Goes From Big to Bit Player," *Broadcasting & Cable*, at 50 (June 16, 1997) ("[Rupert] Murdoch was initially enthusiastic about the News Corp./EchoStar merger, but his ardor cooled once cable operators began refusing to talk to Fox programming people."); Hofmeister, "Murdoch Outfoxing Himself With New Satellite Venture," *Los Angeles Times*, Part D at 1 (March 12, 1997)

left EchoStar at the altar and switched its affections to the cable-controlled PrimeStar DBS service:

> Time Warner, Inc. and [Fox] appear to have entered a symbiotic truce following [Fox's] new proposed affiliation with cable TV industry-owned Primestar Partners L.P. [Fox] originally proposed a merger with EchoStar Communications Corp. to compete with cable TV operators. But according to industry sources, [Fox] received not-so-subtle signals from cable TV operators that its cable TV programming would have trouble finding carriage on their systems if the EchoStar deal went through.[18]

It is also well known that Fox News Channel ("FNC") owes its very existence to Tele-Communications, Inc. ("TCI," since acquired by AT&T), whose agreement to carry FNC on systems serving 90% of TCI's subscribers was critical to the successful launch of the network.[19] Not coincidentally, Fox made FNC available to incumbent cable operators on an exclusive basis.[20] Like the saga of News Corp./EchoStar, FNC's launch and subsequent exclusivity to the cable MSOs is a case study of how the largest incumbent cable operators control the destiny of new programming services, and why programmers sell to cable's competitors at their own risk.[21]

(reporting that after the announcement of the Fox/EchoStar joint venture, cable MSO Marcus Cable "slammed the door shut, refusing to meet with FX or News Corp.'s fledgling Fox News Channel").

[18] "Time Warner, News Corp. Enter Necessary Truce," *The Cable-Telco Report*, at 8 (Aug. 11, 1997). It was also reported that News Corp.'s abandonment of its joint venture with EchoStar was a prerequisite for at least one cable MSO's blessing of Fox's $2 billion acquisition of The Family Channel. *See, e.g.*, Ross, "Murdoch, Malone Weigh $1 Bil Deal: News Corp. Would Acquire Sports Assets From TCI's Liberty Media," *Advertising Age* (March 24, 1997) ("Initially, [TCI] was said to be so upset about the EchoStar deal that [it] wanted to kill a pact under discussion that would see [Fox] making a major investment in International Family Entertainment.").

[19] *See* "TCI Strikes Unique Deal With Fox News," *Media Daily* (June 24, 1996).

[20] "ESPNEWS, Fox Sports Kicking Off Nov. 1," *Media Daily* (Oct. 28, 1996).

[21] Ted Turner recently offered another example of how the largest cable programmers curry favor with the MSOs:

> On why he launched Cable Music Channel in 1984 and folded it a month later: MSOs "needed somebody to leverage MTV, so they said, 'Ted, do us a favor and start a music channel and announce that you're not going to charge any fees, and that way we can negotiate a better deal with MTV.'"

The unsuccessful attempt by the Speedvision and Outdoor Life cable networks to obtain an exemption from Section 628(c)(2)(D)'s ban on exclusivity is equally instructive. At the time, Speedvision and Outdoor Life were owned in part by cable MSOs Cox Communications, Comcast Communications and MediaOne (since acquired by AT&T).[22] In their filings before the Commission, Speedvision and Outdoor Life argued that "their ability to offer exclusive program distribution agreements to cable operators is critical to their obtaining carriage on cable systems and that cable carriage is essential to their survival."[23] Speedvision and Outdoor Life further contended that "carriage on the nation's cable systems is vital to the Networks' ability to achieve the subscriber penetration levels necessary to become and remain commercially viable. . . ."[24] The irony here is telling: while Cox, Comcast and/or AT&T will almost certainly argue in this docket that the largest cable MSOs no longer have market power, they effectively have already conceded to the Commission that in fact the MSOs have enormous economic leverage over start-up cable networks, and thus are in a position to extract exclusivity from them as a *quid pro quo* for carriage.

The retransmission consent process has provided even more evidence of the economic power that incumbent cable operators hold over programming services, even those owned by NBC, CBS and ABC. NBC, for example, surrendered exclusivity for the MSNBC cable network

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> MTV ended up lowering its rates. "We built up a lot of goodwill on the part of people like [then-Tele-Communications, Inc. chairman John] Malone and the other big cable operators that felt they were being screwed by MTV."

"Turner Pleases Crowd with Remarks," *Multichannel News* (Nov. 28, 2001), *at* http://www.multichannel.com.

[22] *Outdoor Life,* 13 FCC Rcd at 12227.

[23] *Id.* at 12228 (footnote omitted).

[24] *Id.* at 12229 (footnote omitted).

to incumbent cable operators in exchange for carriage of NBC broadcast stations.[25] Similarly, during retransmission consent negotiations for carriage of CBS stations, CBS surrendered exclusivity for its own news-oriented cable channel, Eye on People.[26] The Joint Parties have also learned that ABC surrendered exclusivity for the Soapnet cable network to MSO Charter Communications in the Los Angeles market during retransmission consent negotiations for ABC broadcast stations. In other words, when confronted with the dominance of the largest cable MSOs in local markets, NBC, CBS and ABC, like Fox, acquiesced to the MSOs' demand that they withhold their cable programming from competing distributors.

In light of the above, the Joint Parties are extremely concerned that the Commission may soon be forced to tilt the balance against terrestrial competitors even further by relaxing its cable horizontal ownership cap, which establishes a ceiling on the number of multichannel video programming subscribers that may be served by systems in which an incumbent cable operator has an attributable ownership interest.[27] In the wake of the D.C. Circuit's recent decision reversing and remanding the Commission's current 30% cap,[28] the Commission has issued a *Further Notice of Proposed Rulemaking* in CS Docket No. 98-82 *et al.* requesting comment on, among other things, whether it should raise the cap to as much as 60%.[29] While the record created in response to the *Further Notice* will determine the Commission's resolution of that

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[25] *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (October 13, 1997); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996).

[26] *See, e.g.*, "TCI Defends Exclusive Carriage Deals to Senate," *Media Daily* (October 13, 1997); Leibowitz, "The New Cable Economics," *Cable TV Media Law & Finance*, at 6 (March 1997).

[27] 47 C.F.R. § 76.503.

[28] *Time Warner Entertainment Co., L.P. v. United States*, 240 F.3d 1126 (D.C. Cir. 2001).

[29] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 (Further Notice of Proposed Rulemaking)*, CS Docket No. 98-82, FCC 01-263, at ¶¶ 52-59 (rel. Sept. 21, 2001).

issue, it appears at this time that the Commission may have no choice but to raise the cap in order to address the Court's concerns. If, however, the Commission raises the cap *and* stops enforcing Section 628(c)(2)(D), terrestrial competitors would be faced with the worst of both worlds: they would be required to compete for programming in a marketplace where the cable MSOs enjoy unprecedented dominance over distribution, but would have no recourse before the Commission if programmers succumb to that dominance by giving the MSOs exclusive contracts, as they have done in the past.[30] This scenario does not serve the best interests of consumers in any respect and thus demands retention, not a sunset, of Section 628(c)(2)(D).

C. *A Sunset of Section 628(c)(2)(D) Would Expose Terrestrial Competitors To An Unacceptable Risk That They Will Be Denied Access to Programming That Is Essential For A Viable Multichannel Video Programming Service.*

The spectre of increased concentration of the largest incumbent cable operators is not the only public interest justification for continued enforcement of Section 628(c)(2)(D). Of particular concern to the Joint Parties is the fact that Section 628(c)(2)(D) also applies to national and regional sports programming, both of which are indispensable components of a competitive multichannel video service. According to the Commission's *Seventh Annual Report*, vertically integrated cable networks that carry national and/or regional sports programming include TBS (Major League Baseball, NBA), TNT (NBA, tennis (Wimbledon)), HBO (boxing), USA (golf, tennis (U.S. Open)), Comcast SportsNet, Fox Sports Chicago, Fox Sports Cincinnati, Fox Sports New England, Fox Sports New York, Fox Sports Ohio, Fox Sports Pacific, Madison Square

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[30] It should be remembered that the Commission has refused to impose program access conditions on the largest cable industry mergers, citing the fact that aggrieved parties may seek redress for program access abuses under the Commission's existing program access rules. *See, e.g., AT&T/MediaOne*, 15 FCC Rcd at 9854. For the reasons set forth in Section II.A *supra,* that safeguard effectively would be nullified by a sunset of Section 628(c)(2)(D).

Garden Network, SportsChannel Florida, and Sunshine Network. The value of these channels to subscribers is well documented:

> It is [Rupert] Murdoch . . . who most clearly defined the business logic driving this global trend when, two years ago, he told the News Corp. annual meeting that sports "absolutely overpowers" film and all other forms of entertainment in drawing viewers to television. "We have the long-term rights in most countries to major sporting events," he said at the time, "and we will be doing in Asia what we intend to do elsewhere in the world - - that is, use sports as a battering ram and a lead offering in all our pay-television operations."[31]

Fox's recent lawsuit against Turner Broadcasting System, Inc. ("Turner") over Turner's launch of the Turner South regional cable network makes a similar point.[32] Though described as a general entertainment network, Turner South had planned to broadcast games of the Turner-controlled Atlanta Braves, Atlanta Hawks (NBA) and Atlanta Thrashers (NHL). Fox alleged that TBS's launch of Turner South violated the non-compete agreement TBS signed when it sold its interest in a competing regional sports network, SportsSouth, to Fox. In its complaint, Fox left little doubt that regional sports programming drives audience share and advertising sales:

> These [Atlanta Braves, Hawks and Thrashers] telecasts attract a large audience due to the widespread support and loyalty of the fans of those teams. In addition, these live telecasts of sporting events also provide the network and the local [cable] operators the opportunity to capture some smaller portion of the sports audience through pre-game and post-game shows and sports news. Regional sports networks also offer other programming most of which is essentially secondary, which allows the network to offer a full 24 hours of continuous programming to fill the remainder of the broadcast day. Because of its generally lower ratings, the secondary [non-sports] programming produces only and [a] small percentage

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[31] Esterl and Scott, "Murdoch's Big Play," *McLean's*, at 56 (Oct. 19, 1998) (emphasis added). *See also Seventh Annual Report* at ¶ 15 ("Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDs.").

[32] *SportsSouth Network, Ltd. d/b/a Fox Sports Net South, et al. v. Time Warner Inc. and Turner Broadcasting System, Inc.*, File No. 1999CV10083 (Superior Court, Fulton County, GA, filed June 15, 1999).

> of the network's total advertising revenues and small percentage of the total cable television viewers who watch the network's programs, and has little or no impact on subscription fees paid to [the] local operator.[33]

Terrestrial competitors have confirmed before Congress that the loss of even a small amount of regional sports programming may cause irreparable harm to their ability to compete effectively against the cable MSOs who own that programming:

> From the viewpoint of marketing, it is not good enough to say we offer "most" local sports, or "almost all" local sports. The public does not want to have to analyze what is missing; they want to know they will get it all, and this is especially important in a fiercely competitive environment such as the New York City MVPD market. Stated differently, having, for example, 85% of the local sports programming is not 85% as good as having 100%; it is a significant competitive disadvantage, and this is true whether we have 75% or 85% or even 95%.[34]

It therefore comes as no surprise that the largest cable MSOs have refused to give their competitors access to regional sports programming that they control when the Commission has permitted them to do so. For example, by now the Commission is very familiar with Comcast's refusal to sell Comcast SportsNet to DBS competitors in the Philadelphia market, citing the "terrestrial distribution" loophole in Section 628.[35] Comcast's motives are a matter of public record:

> Comcast's purchase of the Philadelphia Flyers, 76ers and Phantoms inspired the company to start up a regional sports network . . . . The question now is whether

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[33] *Id*. at 5; *see also id.* at 7 ("From 1995 through 1998, on average approximately 64% of SportSouth's advertising revenues came from telecasts of Atlanta Braves and Atlanta Hawks games, even though those games (including the pre-game and post-game shows) represented only an average each year [of] 195 hours (2.2%) of the approximately 8,760 hours of programming telecast by SportSouth.").

[34] Testimony of Robert Currey, Vice Chairman, RCN Corporation, Before the United States Senate Judiciary Committee, Subcommittee on Antitrust, Business Rights, and Competition, at 16 n. 22 (April 4, 2001) (citation omitted).

[35] *DirecTV v. Comcast Corp.*, 13 FCC Rcd 21822 (1998); *see also RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, FCC 01-127 (rel. May 30, 2001) (refusal by Cablevision Systems Corp. to sell certain professional sports programming in the New York City market to cable overbuilder RCN, citing the "terrestrial distribution" loophole in Section 628).

> [Comcast President Brian] Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act in order to lock up the Philly area's sports programming. "We don't like to use the words 'corner the market,' because the government watches our behavior," Roberts says with a laugh. "Let's just say we've been able to do things before they're in vogue."[36]

Unfortunately, it appears that Mr. Roberts got his wish: Nielsen reports that of the 2.7 million television households in the Philadelphia market, only 3.7% subscribe to DirecTV or EchoStar - nationally, those services serve over 15% of all television households.[37] Perhaps not coincidentally, Comcast's Philadelphia systems recently increased their rates and, according to one United States Senator, the other cable MSO in the market, AOL Time Warner, has some difficulty with quality of service:

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[36] "The New Establishment," *Vanity Fair*, at 166 (Oct. 1997). Mr. Roberts' "wink and a nod" aside, Comcast has repeatedly argued before the Commission that its distribution of Comcast SportsNet via fiber in the Philadelphia market is a legitimate business strategy that Congress intended to leave beyond the reach of the federal program access law. *See, e.g.,* Reply Comments of Comcast Corporation, CS Docket No. 01-129, at 21 (filed Sept. 5, 2001) ("Congress specifically and consciously omitted terrestrially delivered signals from the exclusivity prohibition. It did so knowing terrestrial delivery is a common, cost-effective, and legitimate method of delivering local and regional programming."). Of late it seems that Comcast has been less enthusiastic about making that argument to Congress. *See* Hearn, "Specter Hot Under Collar About Cable," *Multichannel News*, at 16 (Apr. 16, 2001) (regarding the April 4, 2001 Senate Antitrust Subcommittee hearing on cable competition: "[Senator Specter] . . . voiced distress that Time Warner, Comcast and AT&T Broadband failed to provide witnesses for the hearing. . . 'I am very concerned . . . that a number of invitees have not responded – Time Warner, Comcast, AT&T,' Specter said. 'There are ways to assure attendance other than by invitation, which I think has to be considered by this subcommittee.'"); Breznik, "Senate Antitrust Panel Faults Cable on Rates, Program Access," *Communications Daily*, at 3 (April 5, 2001) ("[S]enators lashed out at [the three] largest MSOs – AT&T, AOL Time Warner and Comcast – for declining invitations to testify, focusing most of their heat on Comcast . . . [Senator Michael] Dewine agreed that Comcast and possibly other invited MSOs had better attend future hearings: 'We would expect that people would not have scheduling problems [two] times in a row.").

[37] Horn, "Prices Tend to Rise as Competition Lags for Cable TV," *The Philadelphia Inquirer*, at p. C01 (June 3, 2001); *see also Seventh Annual Report* at Table C-3. According to trade press reports, Comcast recently agreed to make Comcast SportsNet available to cable overbuilder RCN. It does not appear that Comcast came to that arrangement willfully. *See* Hearn, "Specter Hot Under Collar About Cable," *Multichannel News*, at 12 (Apr. 16, 2001) ("According to Specter, Comcast and RCN resolved their differences over access to Comcast SportsNet in a March 23 meeting in his office. But Specter said he shouldn't be forced to mediate disputes between rivals - - and wouldn't have to if cable faced genuine competition. 'I'm wondering why that commitment had to come in a meeting in a senator's office [and] why that commitment couldn't come between the parties?' Specter said.").

> "I have a constituent who can never get the cable company on the telephone, and she is a very important constituent because when I come home, that's all I hear about," said [Senator Arlen] Specter, apparently referring to his wife, Joan.[38]

Also, according to the Commission's *Seventh Annual Report*, Section 628(c)(2)(D) applies to a variety of "brand name" or otherwise well known news and entertainment cable networks, including CNN/CNN Headline News, Cartoon Network, Cinemax, Comedy Central, Discovery, E! Entertainment, Encore, MSNBC, Starz! and, as noted above, HBO, TBS, TNT and USA.[39] It is impossible for the Joint Parties to predict with complete certainty whether programmers might take these networks exclusive if the Commission stopped enforcing Section 628(c)(2)(D), though the cable MSOs' vigorous endorsement of a sunset appears to answer that question.[40] The Joint Parties do know, however, that a sunset of Sections 628(c)(2)(i) would give vertically integrated programmers insuperable bargaining leverage when negotiating new or renewals of existing affiliation agreements, and that the mere prospect that high-profile

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[38] Hearn, n. 37 *supra*; Horn, n. 37 *supra* (quoting Senator Specter: "I find the service. . . has been just unacceptable. . . The costs are just very high."). *See* also Horn, "Comcast Phila. Rates to Rise Nearly 5% June 1," *The Philadelphia Inquirer*, p. C01 (April 19, 2001).

[39] *Seventh Annual Report*, Table D-1; *see also id.* at ¶ 175 (noting that "11 of the top 20 video programming networks ranked by prime time ratings are vertically integrated with the cable MSOs"). *See also* Umstead, "TBS Tops Lifetime in Nov. Primetime," *Multichannel News* (Nov. 28, 2001), *at* *http://www.multichannel.com* (Nielsen ratings show that TBS was the top-rated cable network in prime time during November 2001 – the top ten prime time cable networks for the period also include USA, Cartoon Network, TNT, CNN and Discovery); Waltner, "The Hot Insertable Nets," *Multichannel News Supplement*, at 20S (Nov. 12, 2001) (noting that CNN, USA, TBS, TNT and Discovery are among cable's 10 to 15 "core channels" for local advertising inserts). The Commission clarified in 1999 that MSNBC is vertically integrated and thus covered by the statute. *Cable Ownership Attribution Order*, 14 FCC Rcd at 19054-7.

[40] *See, e.g.*, Reply Comments of Comcast Corporation, CS Docket No. 01-129, at 17 (filed Sept. 5, 2001) (the "Comcast Reply Comments"); Reply Comments of Cablevision Systems Corporation, CS Docket No. 01-129, at 6-7 (filed Sept. 5, 2001) (the "Cablevision Reply Comments"); Comments of the National Cable & Telecommunications Association, CS Docket No. 01-129, at 36-39 (filed Aug. 2, 2001) (the "NCTA Comments"). *Cf. FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) ("[T]he Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations.").

programming services such as CNN/CNN Headline News, Discovery, HBO/Cinemax, MSNBC, TBS or TNT might be taken exclusive by the largest cable MSOs is more than enough to sour investors on terrestrial competition and chill new funding of terrestrial "overbuild" (wired or wireless) technologies.

The cable MSOs will likely respond to this by arguing that program access complaints before the Commission have been relatively few in number, and that this is dispositive evidence that the program access problem is *de minimis* and thus no longer requires Commission oversight. What the MSOs forget is that the purpose of the program access law is to "deter discriminatory or improper conduct."[41] Hence, even if the number of program access cases before the Commission were relevant to the debate over Section 628(c)(2)(D), it would only tend to show that the statute is having its intended deterrent effect and should continue to be enforced.

Moreover, while it is true that Section 628 has not generated the same volume of adjudicated cases as, say, cable rate regulation, the program access cases that *have* been before the Commission speak volumes about the willingness of the largest cable MSOs to exploit "gaps" in Section 628 wherever possible to deny their competitors full and fair access to critical programming. In the past, the Commission has recognized the potential anti-competitive effects of the MSOs' "end runs" around Section 628, but has been reluctant to take action absent a more explicit delegation of authority from Congress.[42] If that is still the Commission's position, then the appropriate remedy is not to create *another* exclusivity loophole for the MSOs by discontinuing enforcement of Section 628(c)(2)(D). Rather, the Commission should do what

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[41] *Cable Ownership Attribution Order*, 14 FCC Rcd at 19056.

[42] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, To AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3180 (1999).

Congress has clearly authorized it to do – enforce Section 628(c)(2)(D) as it has done in the past, so that terrestrial competitors may continue to deploy facilities and market service with at least some assurance that the programming covered by the statute will remain available to them and their subscribers.

D. *Continued Enforcement of Section 628(c)(2)(D) Is Necessary To Preserve the Pro-Consumer Benefits of Terrestrial Competition to Cable.*

The cable industry's principal trade association has advised Congress that, notwithstanding an increasingly challenging economic environment, terrestrial competitors have not folded their tent and declared defeat:

> The ability to sell telephone, high speed Internet access, and an expanded number of video programming channels over a single broadband facility (or in conjunction with wireless or satellite providers) is providing new incentives for facilities-based broadband competition. Companies like RCN, Knology, WideOpenWest, Altrio, Carolina Broadband, Everest Connection, Grande Communications, and Western Integrated Networks have obtained franchises to provide consumers with competitive broadband services. Although relatively new, and despite recent difficulties in the capital markets, these companies have raised billions of dollars to construct alternative broadband facilities in various areas across the country.[43]

In turn, the cable MSOs have advised Congress that terrestrial competitors contribute to an environment in which incumbent cable operators are motivated to add new services and improve existing ones:

> [Charter's] massive rebuilding project is not occurring in a vacuum. Charter is engaged in a fierce competitive battle with DBS providers, telephone companies, utilities, and cable overbuilders. The billions of dollars we are investing to upgrade our plant from a one-way analog video delivery service into a two-way interactive digital platform is in large part fueled by the

[43] Testimony of Robert Sachs, President and CEO, National Cable & Telecommunications Association, Before the Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, at 6 (April 4, 2001). *See also* NCTA Comments at 20-25 (discussing terrestrial competition).

> competition we face in the marketplace. We are deploying advanced services to set us apart from the competition in the eyes of the consumer.[44]

Data from a variety of sources confirms that the presence of terrestrial competition produces direct and immediate benefits to consumers in the form of lower prices and upgraded and/or more diverse services. The Commission's *Seventh Annual Report*, for example, cites examples of communities where market entry by terrestrial competitors has driven the incumbent cable operator to lower rates and/or upgrade its system.[45] As recently reported in *Multichannel News*, Qwest's wireline overbuild in Omaha, NE has produced competition with cable MSO Cox Communications in the market for the delivery of "bundled" cable, voice and data services.[46] Cable overbuilder RCN has testified to Congress about the pro-competitive effects of its entry into the Washington, D.C. market:

> RCN's affiliate in Washington, D.C., Starpower, has provoked dramatic changes in the offerings of incumbent cable operators, discouraging price increases and improving service offerings. Upon the announcement of Starpower's entry into the market, the D.C. incumbent's rate increases moderated from previously announced annual increases in the range of 7% to a mere 2% in 1998. Starpower's basic rate in Washington, D.C. is $31.95 for 96 channels and no installation fee. Comcast charges $33.87 for 56 channels with a $39.95 installation fee. In anticipation of competitive entry, Cox Cable announced that it would upgrade its cable [system] to 860 MHz capacity in Fairfax County. In Prince George's County, Comcast announced an upgrade of its plant beyond its franchise obligation in light of Starpower's arrival. Comcast in Arlington announced a major overhaul of its channel line-up with significant additional channel capacity and digital

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[44] Testimony of Jerry Kent, Before the Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, at 1 (April 4, 2001).

[45] *Seventh Annual Report* at ¶¶ 219-227, 232-234. *See also* "The Effect of Competition From Satellite Providers on Cable Rates," Report to Congressional Requesters (GAO/RCED-00-164), United States General Accounting Office, at 7 (July 2000) ("The presence of a nonsatellite competitor – such as another cable company or a wireless cable operator – was associated with lower cable rates. In particular, we found that when such a competitor was operating in part or all of a franchise area, cable rates were, on average, 10 percent lower than in franchise areas with no ground-based competitors.").

[46] Stump, "In Omaha, Cox and Qwest Wage Three-Way Contest," *Multichannel News*, at 27 (Oct. 1, 2001).

> upgrades to make its offerings more competitive with newly franchised Starpower.[47]

Similarly, one of the Joint Parties, Altrio Communications, Inc., is on the verge of launching a competitive terrestrial wireline service in the Los Angeles market, offering subscribers packages consisting of hundreds of channels of digital video service, high-speed Internet and/or voice service. Altrio has already obtained authority to operate competitive wireline systems in the communities of Arcadia, Pasadena and Monrovia (encompassing approximately 100,000 homes), and has franchise applications pending for Burbank, Glendale and portions of the City and County of Los Angeles.

Moreover, additional terrestrial competition is provided by wireless cable operators, particularly in smaller markets and rural areas where wireline "overbuilds" and/or DBS local-into-local service may not be available for the foreseeable future. Indeed, while it is true that fixed wireless operators now have unprecedented opportunities to utilize MDS/ITFS spectrum for non-video services, wireless cable providers such as Nucentrix Broadband Networks, Inc. (various communities throughout the Midwest and Texas), W.A.T.C.H. TV (Lima, OH), CNI Wireless (Somerset, KY), Teton Wireless (Missoula, MT and Twin Falls/Idaho Falls, ID) and WHTV Broadcasting Corp. (various communities in Puerto Rico) have long been the only *bona fide* competition to incumbent cable operators in their respective markets.[48] And, as noted in the

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[47] Currey Testimony at 12-13; *see also id.* at 11 (discussing pro-competitive effects of RCN's entry into the Boston market); Comcast Reply Comments at 10 (noting that cable overbuilder Knology is competing with Comcast in Charleston, SC; Panama City, FL; Huntsville, AL; Knoxville, TN; and Augusta, GA).

[48] For example, W.A.T.C.H. TV currently has over 11,000 subscribers in smaller cities and rural areas throughout western Ohio. The company installed its first video customer on April 1, 1992, with an initial offering of 11 channels. Over the next four years, W.A.T.C.H. TV expanded its service to 33 channels. Recognizing that it could not compete effectively with incumbent cable operators or DBS with only a single offering of one-way analog multichannel video service, W.A.T.C.H. TV recently converted all of its subscribers to digital service (paving the way for a 160-channel multichannel video offering) and just last month began offering two-way high-speed Internet service via its MDS and MMDS frequencies.

Seventh Annual Report, private cable or "SMATV" operators provide service to a substantial number of subscribers in multiple dwelling units ("MDUs"), in many cases offering the packages of "bundled" services competitive with those of incumbent cable operators.[49]

Nonetheless, the largest cable MSOs continue to lobby the Commission for a sunset of Section 628(c)(2)(D), on the theory that DBS essentially provides all the competition Congress and consumers could ever want and thus obviates the need for any further enforcement of the statute.[50] The argument is hard to understand: at the same time that they are touting the pro-consumer benefits of competition to Congress and the Commission, the MSOs are asking the Commission to stop enforcing a law that permits that same competition to exist. Furthermore,

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W.A.T.C.H. TV has persevered despite the fact that Disney and other programmers will not permit the company's primary source of programming, the National Cable Television Cooperative, to sell programming to wireless cable operators. W.A.T.C.H. TV is especially concerned about the possibility that a sunset of Section 628(c)(2)(D) would permit one of its principal competitors, AOL Time Warner, to withhold AOL Time Warner programming that W.A.T.C.H. TV must have in order to compete effectively for subscribers (*e.g.,* CNN, HBO, TBS, TNT, Turner Classic Movies, etc.).

[49] *Seventh Annual Report* at ¶¶ 92-93. *See also* Cablevision Reply Comments at 3 ("Cablevision also faces significant competition from various providers of SMATV service."). The importance of program access to the private cable industry is discussed in greater detail in IMCC's contemporaneous comments in this docket under separate cover. IMCC's comments also note the additional challenges faced by private cable operators due to anticompetitive behavior by the largest cable MSOs in the MDU environment.

[50] *See, e.g.,* Reply Comments of Cablevision Systems Corporation, CS Docket No. 01-129, at 6 (filed Sept. 5, 2001) ("EchoStar and DirecTV are now major competitors in the MVPD marketplace, and artificial support to help fledgling competitors become established is no longer necessary. Given the robust level of competition, the program access rules should be allowed to sunset.") (the "Cablevision Reply Comments"); Comcast Reply Comments at 17 ("Given the level of MVPD Competition that has now developed, which is *at least* equal to what Congress might reasonably have hoped in 1992, it is entirely appropriate to permit the prohibition on exclusive contracts to sunset.") (emphasis in original). It is worth noting that Cox, Comcast and MediaOne had a decidedly different opinion of DBS when they attempted to obtain an exemption from Section 628(c)(2)(D) for Speedvision and Outdoor Life. Petition for Exclusivity filed by the Outdoor Life Network and Speedvision Network, CSR-5044-P, at 14 (filed July 15, 1997) ("Cable systems are still the primary distributor of multichannel video programming and, thus, carriage by the nation's cable systems is central to the Networks' ability to increase subscriber penetration to adequate levels. *Not even carriage by all of the non-cable MVPDs in the United States would be sufficient to make networks like Outdoor Life and Speedvision commercially viable.*") (emphasis added) (the "Speedvision/Outdoor Life Petition").

the fact that the market for multichannel video service has "evolved" from a cable monopoly to a market dominated by cable and DBS is hardly persuasive evidence that the market is fully competitive, particularly now that DirecTV and EchoStar are proposing to merge their operations. Also, even the DBS industry implicitly acknowledges that DBS is not a complete substitute for cable in markets where DBS is unable to offer local-into-local service.[51]

More fundamentally, the cable MSOs' argument cannot be squared with the fact that Congress passed the current version of Section 628 in lieu of an alternative proposal that would have afforded full program access protection only to the satellite industry.[52] The cable MSOs' argument is also completely at odds with the *Outdoor Life* case discussed above, in which the Cable Services Bureau held that "[a]ccess to programming by all non-cable MVPDs is crucial to the development of vigorous and widespread competition in the distribution market," and thus refused to approve an exclusivity proposal that would have permitted the vertically integrated

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[51] *See, e.g.*, Testimony of Eddy W. Hartenstein, Corporate Senior Executive Vice President, Consumer Sector, Hughes Electronics Corporation and Chairman, DirecTV Global, Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, at 1 (April 4, 2001) ("The ability to offer local content enables DirecTV to offer consumers a service that is fully competitive with cable in terms of content and price in the markets in which we are offering local channel service."). Due to technical and regulatory issues, there may continue to be many markets where DBS is unable to offer any local-into-local service at all or, in the case of larger markets such as Los Angeles, carry all available local television broadcast signals. *See Ex Parte* Letter from Peter Pitts, Executive Director, EARN, to Magalie Roman Salas, Secretary, Federal Communications Commission, CS Docket No. 01-129 (filed Sept. 12, 2001); Sieberg, "EchoStar Offers Novel Theory to Back DirecTV Buy," *The Daily Deal*, at 1 (Nov. 16, 2001).

[52] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."). During the floor debate over the program access amendment offered by Rep. Billy Tauzin and ultimately included in the 1992 Act as Section 628, the United States House of Representatives rejected an alternative amendment from Reps. Manton and Rose (the "Manton-Rose Amendment") which would have extended full program access protection only to C-band direct broadcast satellite operators. See 102 Cong. Rec. H6532-3 (July 23, 1002); *see also id.* at H6534 (Statement of Rep. Billy Tauzin) (stating that the Manton-Rose amendment "sets an almost impossible proposition for all of the other competitors other than the C-band dish. What it says to them is that cable has to deal with you, but the terms and conditions can be as discriminatory as they want.").

Speedvision and Outdoor Life cable networks to inflict exclusivity on terrestrial competitors but not DBS.[53] In fact, this has been the Commission's position for some time now:

> While the exclusivity at issue here [for Court TV] is not enforceable against DBS providers, the statutory public interest test requires us to consider the effect of exclusivity on *all* alternate technology competitors, not just DBS. [SMATV operator] Liberty [Cable] is an emerging competitor to Time Warner throughout New York City . . . . While potential competition from DBS is unaffected by Time Warner's contracts, Liberty as an existing alternate technology competitor to cable would clearly be affected by the proposed exclusivity [for Court TV]. The effect of the proposed exclusivity on Liberty is, therefore, highly relevant, and we conclude that this effect weighs against a finding that such exclusivity is in the public interest.[54]

Finally, as alluded to above, the Commission should remain cognizant of the fact that incumbent cable operators are responding to terrestrial competition by offering subscribers full "bundles" of video, data, and/or voice services, and that terrestrial competitors must be prepared to do the same if they are to have a fighting chance at attaining the level of market share necessary for viability.[55] Thus, terrestrial competitors that bundle voice and/or data with video will find themselves stranded at the starting gate if the video piece of the bundle is taken out from under them by a sunset of Section 628(c)(2)(D). Given Chairman Powell's recent emphasis

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[53] *Outdoor Life*,13 FCC Rcd at 12236.

[54] *Time Warner Cable*, 9 FCC Rcd 3221, 3228 (1994) (emphasis in original).

[55] *See, e.g.*, "The Changing Status of Competition to Cable Television," Report to the Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, United States Senate, GAO/RCED-99-158, at 3 (July, 1999) ("If several different types of companies – cable companies, telephone companies, electric companies, and companies using different kinds of 'wireless technologies' – are successful in bringing a 'bundle' of telecommunications services to consumers, competition among alternative delivery mechanisms – a cable wire, a telephone wire, an electric wire, and wireless – may develop.

on encouraging facilities-based broadband competition, there is no legitimate public interest justification for the Commission to expose terrestrial competitors to that kind of risk.[56]

E. *Enforcement of Section 628(c)(2)(D) Has Not Diminished Programming Diversity or Discouraged Incumbent Cable Operators From Investing in Programming.*

At paragraph 8 of the *NPRM*, the Commission asks whether enforcement of Section 628(c) has had a negative impact on the development of new cable programming networks or on "whether more affiliations between cable operators and programmers would have developed in the absence of the exclusivity provision." The answer to both questions is "no."

By any relevant measure, the number of available national cable programming networks has increased dramatically during the nine years in which Section 628(c)(2)(D) has been in effect. For example, in its first annual *Video Competition Report* to Congress after passage of the 1992 Act, the Commission identified a total of 106 available national cable programming services, 56 of which were vertically integrated.[57] In its most recent *Video Competition Report* to Congress, the Commission identified a total of 283 national cable programming networks, 99 of which were vertically integrated. While the proportion of vertically to non-vertically integrated networks has decreased (in no small part due to programmers selling off their cable system operations (*e.g.*, Viacom) or MSOs spinning off their programming operations for unrelated

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[56] *See* "Digital Broadband Migration – Part II," Remarks of Michael K. Powell, Chairman, Federal Communications Commission (October 23, 2001), available at *http://www.fcc.gov/Speeches/Powell/2001/spmkp109.html* ("I believe that other methods of entry are useful interim steps to competing for local service, but Commission policy should provide incentives for competitors to ultimately offer more of their own facilities. This would decrease reliance on incumbent networks, provide the means for truly differentiated choice for consumers, and provide the nation with redundant communications infrastructure.").

[57] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 – Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, Tables 3 and 4 (1994).

business reasons (*e.g.*, AT&T/Liberty)), these statistics certainly do not suggest that enforcement of Section 628(c)(2)(D) has had a chilling effect on program diversity or stopped incumbent cable operators from investing in programming, and indeed the cable MSOs have reported to the Commission that their subscribers now have more programming choices available to them than ever before.[58]

Moreover, the cable MSOs have yet to establish that a cable network's inability to offer incumbent cable operators exclusivity has any meaningful relationship to whether that network succeeds or fails in the marketplace. Again, the record in the *Outdoor Life* case is dispositive. There, the Speedvision and Outdoor Life networks admitted in their own filings before the Commission that their failure to obtain cable carriage was attributable to a variety of marketplace factors that have nothing to do with exclusivity.[59] For example, the Networks stated that channel capacity, not exclusivity, was "*the number one reason* given by cable systems to new programming networks in denying carriage requests."[60] The networks also cited a variety of other reasons for their inability to achieve wider cable distribution, most of which affect all new cable networks equally and, once again, have nothing to do with exclusivity. The following quotation is a case in point:

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[58] *See, e.g.*, NCTA Comments at 31 ("Some cable operators receive . . . digital programming services from AT&T's National Digital Television Center via headend in the Sky (HITS), while others receive programs directly from programmer uplinks. HITS consumers can choose from 12 separate digital tiers that offer up to 155 digital networks.").

[59] It is particularly revealing that Speedvision/Outdoor Life's Executive Vice President/Chief Operating Officer, Roger Williams, was quoted by the trade press as admitting that the two networks were "unlikely to dry up and blow away" if the Commission denied their request for exclusivity. *Outdoor Life*, 13 FCC Rcd at 12239. Mr. Williams was prescient: recent trade press reports indicate that Speedvision and Outdoor Life currently reach 45 million and 40 million cable homes, respectively. *See, e.g.*, Umstead, "Niche Sports Nets Show They Have Game," *Multichannel News* (Nov. 26, 2001), *at* http://www.multichannel.com.

[60] Speedvision/Outdoor Life Petition at 15.

> While carriage decisions by MVPDs focus on matters such as rates, incentives, volume discounts and other economic terms, such negotiations are also significantly influenced by the MVPDs' perceptions of the strength and staying power of a new network, its ability to continue to fund quality programming, and its attractiveness to major advertisers; for an MVPD may be unwilling to commit a scarce, sought-after channel to a network whose growth in distribution and revenues appears, based on whatever data may be available, to be lagging behind the network's own forecasts or the growth of other networks.[61]

The above-quoted admissions by Speedvision and Outdoor Life (and, by implication, their MSO owners at the time – Cox, Comcast and Media One/AT&T) merely confirm what has already been proven in the marketplace, namely that the success or failure of a cable programming network is not inextricably tied to whether the network is able to enter into exclusive contracts with incumbent cable operators. The success of a number of start-up cable networks that either do not or cannot offer exclusivity (e.g., The History Channel, Cartoon Network, Home & Garden Network, Animal Planet, The Golf Channel) demonstrates that the quality and marketability of a cable network's programming, not exclusivity, ultimately determines whether it will achieve extensive cable distribution.[62] Exclusivity, in other words, is

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[61] Reply to Opposition to Request to Withhold Information From Public Inspection filed by Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C., CSR 5044-P, at 4 (filed Aug. 20, 1997). *See also* Speedvision/Outdoor Life Petition at 15-20, 39 (citing factors such as cable rate regulation, depressed cable stock prices, the cable industry's decision to devote scarce cable channels to more profitable uses (*e.g.*, home shopping, premium channels), must-carry, PEG and leased access requirements, the high cost of digital conversion and the fact that Outdoor Life transmits only in the digital mode).

[62] *See, e.g.*, Forkan, "Golf Channel Sees Sales Green Ahead," *Multichannel News* (Sept. 24, 2001), *at* *http://www.multichannel.com*. Indeed, notwithstanding the possibility that the Commission may elect to continue enforcing Section 628(c)(2)(D), just days ago Comcast announced the launch of G4, a video-gaming oriented network 100% owned by Comcast and thus covered by the statute. Lack of exclusivity notwithstanding, Comcast has stated that cable systems serving seven million subscribers have already agreed to carry the network, and that the network expects to be carried on systems serving another 2.5 to 5 million households by the end of next year. "Comcast, Insight Commit to G4," *Multichannel News* (Nov. 29, 2001), *at* *http://www.multichannel.com*. Comcast also indirectly confirmed that carriage by the largest cable MSOs is critical to the success of the network. *See* Parker, "Comcast Plans Cable Channel, Website for Video Game Fans," *The Philadelphia Inquirer*, at p. C01 (Nov. 29, 2001) "Comcast, the principal investor in the project, said it could get the venture off the ground for less than $200 million if it could make the channel available to 20 million to 30 million cable subscribers.").

"necessary" only to incumbent cable operators who wish to ensure that their competitors do not have full and fair access to programming. Once again, this is not a legitimate public interest justification for the Commission to stop enforcing Section 628(c)(2)(D).

III. CONCLUSION.

The Joint Parties wish to emphasize that they stand ready, able and willing to negotiate nonexclusive affiliation agreements with cable programmers on nondiscriminatory terms and conditions. The issue here, however, is whether they will be afforded the opportunity to do so after October 5, 2002. With dramatically increased concentration of the cable and DBS industries apparently on the horizon, now is not the time for the Commission to weaken the program access law and thereby endanger the prospects of terrestrial competition and pro-competitive benefits it is poised to provide to consumers. Moreover, all available evidence reflects that a sunset of Section 628(c)(2)(D) would only increase the cable MSOs' leverage over programmers and thus reverse the slow but steady gains terrestrial competitors have achieved in the marketplace since passage of the 1992 Act. There is no public interest rationale for the Commission to court that result, particularly as there is no compelling evidence that enforcement of Section 628(c)(2)(D) over the past nine years has caused programmers or incumbent cable operators any harm whatsoever. Simply stated, the balance of equities here decisively favors preservation of the status quo. The Joint Parties therefore urge the Commission to issue a clear and unequivocal declaration in this proceeding that enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve competition and diversity in the distribution of video programming," and that the Commission will therefore continue to enforce the statute beyond October 5, 2002.

Respectfully submitted,

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EXHIBIT A

ALTRIO COMMUNICATIONS, INC.

Founded in mid-2000, Altrio Communications, Inc. is a competitive wireline provider that will soon be offering consumers packages of video, high-speed Internet, and/or voice services in direct competition with the largest cable MSOs in the Los Angeles market. Altrio has received authority to launch analog and digital video programming services under cable television or open video ("OVS") franchise agreements in the communities of Arcadia, Pasadena and Monrovia (encompassing approximately 100,000 homes) and has franchise applications pending for Burbank, Glendale and portions of the City and County of Los Angeles. For more information about the company, its technology, and the packages of services it is offering to consumers, see http://www.altrio.net.

BELLSOUTH ENTERTAINMENT, LLC

BellSouth Entertainment, LLC, a second-tier subsidiary of BellSouth Corporation, is a competitive provider of multichannel video service in various markets in the southeastern United States, using primarily wired broadband cable technologies. The company currently holds 20 cable franchises to provide cable service in communities encompassing approximately 1.4 million potential cable households. It currently provides cable service in Vestavia Hills, Alabama; Chamblee, Cherokee County, Cobb County, Dekalb County, Duluth, Gwinnett County, Lawrenceville, Roswell, and Woodstock, Georgia; and Dade County, Davie, Miami Lakes, Pembroke Pines, and St. Johns County, Florida.

INDEPENDENT MULTI-FAMILY COMMUNICATIONS COUNCIL (IMCC)

IMCC represents a cross-section of companies in the telecommunications industry, including private cable operators ("PCOs"), shared tenant services providers, equipment manufacturers, program distributors, broadband Internet service providers ("ISPs") and, importantly, residential property management and development companies. While IMCC members originally concentrated their competitive entry efforts exclusively on video services, the last six years have marked an expansion into the provision of voice and data communications services to residents of multiple dwelling units throughout the country. IMCC members employ a variety of communications technologies, including wired, wireless and direct broadcast satellite ("DBS"), to serve the residential MDU market, which includes some 30 million households.

QWEST BROADBAND SERVICES, INC.

Qwest Broadband Services, Inc., a wholly-owned subsidiary of Qwest Communications International Inc., provides multichannel video programming service in the Omaha, Nebraska, Phoenix, Arizona, and Denver, Colorado areas. Qwest's Phoenix and Denver systems have pioneered the use of VDSL (very high speed digital subscriber line) and switched digital video technology to deliver high quality video and high speed data services over twisted pair copper telephone lines, to present consumers with a competitive alternative to their incumbent cable operator. Using VDSL, Qwest delivers over 180 available channels of video programming, 45 channels of music, and Internet access speeds from 256 and 640 Kbps to 1 Mbps. Qwest holds a total of thirteen cable franchises.

THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL INC. (WCA)

WCA is the trade association of the fixed wireless broadband industry. It has served as the primary industry advocate for users of MDS and ITFS spectrum in the 2.1 and 2.5 GHz band for two decades, and has participated extensively in every Commission proceeding affecting MDS/ITFS operators during that time. WCA's members include the operators of nearly all MDS/ITFS systems in the United States, the MDS and ITFS licensees who provide spectrum for use in such systems, equipment suppliers, and consultants. It has been estimated that MDS/ITFS operators currently provide multichannel video service to 750,000 subscribers in local markets throughout the country.